

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN BERNARD PULLIAM,

Defendant-Appellant.

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UNPUBLISHED

August 5, 2004

No. 247550

Saginaw Circuit Court

LC No. 02-021987-FC

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of two counts of armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to 120 months to 30 years' imprisonment. We affirm.

Defendant first argues that the trial court erred in denying his motion for a directed verdict because there was insufficient evidence to submit the conspiracy charge to the jury. We review the evidence presented by the prosecution up to the time the motion was made in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

Conspiracy is a partnership of two or more individuals who have voluntarily agreed to commit an unlawful act. *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). This Court has held that "the essence of a conspiracy is an agreement to do that which is unlawful," and that "it must be shown that the respective coconspirators intended to further, promote, or cooperate in the unlawful enterprise." *People v Gay*, 149 Mich App 468, 470; 386 NW2d 556 (1986). "Direct proof of the agreement is not required, nor is it necessary that a formal agreement be proven. It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact." *Id.* at 471. Additionally, "conspiracy may be established by circumstantial evidence and may be based on inference." *Id.*

At the time defendant moved for a directed verdict on the conspiracy charge, the prosecution had presented evidence that defendant and Kevin Powell worked together to lure David and Deborah Ozark into a van to rob them: Powell slowed his van and passed the Ozarks, then circled back to them and stopped; defendant jumped out of the van and put a tire iron to

David Ozark's back, forcing the Ozarks into the van; once inside, Powell held David Ozark down while defendant frisked him and took his wallet and class ring; defendant demanded and took Deborah Ozark's wedding ring; defendant and Powell were both yelling at the Ozarks to relinquish their personal property; and following the robbery, defendant and Powell divided up the proceeds between themselves. Viewing the evidence in the light most favorable to the prosecution, we find that the trial court properly denied defendant's motion for a directed verdict. There was sufficient evidence that defendant and Powell agreed to rob the Ozarks, based on the "circumstances, acts, and conduct of the parties," so as to warrant submitting the conspiracy charge to the jury. *Gay, supra* at 471. Therefore, defendant is not entitled to relief on this basis.

Defendant next argues that the trial court erred in failing to specify the name of the co-conspirator in the jury instructions. We disagree. Because defendant failed to object to the jury instructions as given, we review this issue for plain error affecting defendant's substantial rights. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003). "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Here, the trial court instructed the jury that "[t]o prove the defendant's guilt, the prosecutor must prove . . . beyond a reasonable doubt . . . that the defendant and someone else knowingly agreed to commit armed robbery." See CJI2d 10.1. Defendant argues that the trial court erred in failing to specifically name Powell as the co-conspirator, and relies on this Court's decision in *People v Smith*, 85 Mich App 404; 271 NW2d 252 (1978), rev'd on other grounds 406 Mich 945; 277 NW2d 642 (1979), to support his argument that such an omission amounted to reversible error. But unlike the situation in *Smith*, the evidence in this case did not lead the jury to be confused about the identity of defendant's co-conspirator. Instead, the record supports a finding that both defendant and the jury were clearly aware that defendant was charged with conspiring with Powell to rob the Ozarks. Therefore, relief is unwarranted because the instructions fairly presented the issues to be tried, and there was no plain error affecting defendant's substantial rights.

Defendant next argues that his due process rights were violated when the prosecution inadvertently failed to provide defense counsel with defendant's tape-recorded confession and Powell's statement to the police until the third day of trial. However, even when the prosecution stated that it would not have any objection to a continuance, defense counsel stated "I can't identify frankly any specific prejudice at this point," and agreed to proceed without delay or continuance. Because defense counsel agreed to proceed without objection, his acquiescence constituted a waiver of the issue; therefore, we need not consider it on appeal. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).<sup>1</sup>

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<sup>1</sup> Even had defense counsel properly preserved this issue, we find no merit to defendant's assertion that his due process rights were violated because Powell's statement was exculpatory. While it is true that "[s]uppression by the prosecution of evidence [requested by and] favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution," *Brady v Maryland*, (continued...)

Finally, defendant argues that the trial court erred in permitting the Ozarks to give identification testimony at trial. Specifically, defendant contends that both witnesses identified defendant at the preliminary examination under impermissibly suggestive circumstances, and had no independent basis on which to identify him at trial. We disagree.

We will not reverse a trial court's decision to admit an in-court identification unless it is clearly erroneous. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* "If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Kurylczuk*, 443 Mich 289, 302; 505 NW2d 528 (1993). "The fact that the prior confrontation occurred during the preliminary examination . . . does not necessarily mean that it cannot be considered unduly suggestive." *Colon, supra* at 304. However, "[s]imply because an identification procedure is suggestive does not mean it is constitutionally defective." *Kurylczuk, supra* at 306.

At a pre-trial hearing, defendant argued that the Ozarks' identification of him at the preliminary examination was impermissibly suggestive because he was wearing an orange jail uniform. However, we find no error in the trial court's decision that there was a sufficient independent basis from which the Ozarks could identify defendant. "When examining the totality of the circumstances [surrounding the pretrial identification procedure], relevant factors include: the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation." *Colon, supra* at 304-305.

In the instant case, there is no dispute that the preliminary examination was a suggestive atmosphere in that defendant was wearing prison garb in the courtroom. See *Colon, supra* at 305. However, the Ozarks observed defendant for approximately ten minutes inside the van while they were being robbed, and were focused primarily on defendant, as he was the perpetrator primarily demanding their money and other personal property. Additionally, the description of defendant the Ozarks gave to the police immediately following the incident was fairly accurate and consistent with defendant's appearance and clothing. Finally, the Ozarks

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(...continued)

373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), Powell's statement was inculpatory in that he eventually admitted that he and defendant had been in the van and robbed the Ozarks together. Therefore, we conclude that the evidence does not meet the *Brady* requirement of materiality, and that even had defense counsel been given the evidence earlier, "there is [not] a reasonable probability that . . . the result of the proceeding would have been different." *People v Banks*, 249 Mich App 247, 255; 642 NW2d 351 (2002), quoting *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985).

were unequivocal in their identification of defendant at the preliminary examination, which occurred less than three months after the incident.

Under the totality of the circumstances, defendant has failed to show that there was a substantial likelihood of misidentification. The prosecution showed, by clear and convincing evidence, that the Ozarks' identification of defendant had a sufficiently independent basis and was not based on any suggestiveness surrounding the preliminary examination; therefore, the trial court's determination that the Ozarks' identification of defendant had an independent basis was not clearly erroneous.

We affirm.

/s/ Richard A. Bandstra  
/s/ E. Thomas Fitzgerald  
/s/ Joel P. Hoekstra